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Issue Date: 04 January 2007

CASE NO.: 2006-LHC-00572

OWCP NO.: 01-163031

In the Matter of

K. T.[1]
Claimant

v.

COLUMBIA COASTAL TRANSPORTATION, LLC
Employer

And

AIM MUTUAL INSURANCE CO.
Insurer

Appearances:

Christopher Hug, Boston, Massachusetts
for the Claimant

Ronald St. Pierre, Newburyport, Massachusetts,
for Columbia Coastal Transportation, LLC
and AIM Mutual Insurance Co.

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

I. Statement of the Case

[1] In accordance with Claimant Name Policy which became effective on August 1, 2006, the Office of Administrative Law Judges uses a claimant's initials in published decisions in lieu of the claimant's full name. *See* Chief ALJ Memorandum dated July 3, 2006 available at http://www.oalj.dol.gov/PUBLIC/RULES_OF_PRACTICE/REFERENCES/MISCELLANEOUS/CLAIMANT_NAME_POLICY_PUBLIC_ANNOUNCEMENT.PDF.

This proceeding arises from a claim for worker's compensation benefits filed by K. T. ("the Claimant") against the Columbia Coastal Transportation, LLC ("the Employer") and AIM Mutual Insurance Co., ("the Insurer") under the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*. ("the Act"). The Claimant began working for the Employer as a longshoreman during the fall of 2004. On June 30, 2005, he was involved in an industrial accident at the Conley Terminal in South Boston, Massachusetts. The Claimant has been out of work since that time and seeks an award of temporary total disability compensation from June 30, 2005 to the present and continuing as well as medical expenses and attorney's fees. The Employer declined to accept his claim, contending that there is no causal relationship between the alleged disability and any workplace injuries and that the June 30, 2005 accident was caused by the Claimant's own misconduct. Additionally, the Employer contested the medical bills, average weekly wage of the employee, and the nature and extent of the disability. After the parties were unable to arrive at a resolution during informal proceedings before the District Director of the Department of Labor's Office of Workers' Compensation Programs ("OWCP"), the claim was referred to the Office of Administrative Law Judges ("OALJ") for formal hearing pursuant to section 19(d) of the LHWCA. 33 U.S.C. § 919(d).

Pursuant to notice, a formal hearing was conducted before me in Boston, Massachusetts on April 26, 2006, at which time the Claimant appeared represented by counsel, and an appearance was made on behalf of the Employer and Insurer. The Claimant testified at the hearing, and documentary evidence was admitted without objection as Claimant's Exhibits ("CX") 1-10 and ALJ Exhibits ("EX") 1-11. Hearing Transcript ("TR") 5, 16. The Employer did not offer exhibits because the documents relevant to their argument were admitted as exhibits by the Claimant as CX-6 and CX-10. TR 16. Stipulations were offered as Joint Exhibit ("JX") 1. TR 11. At the close of the hearing, all parties agreed to hold the record open to submit additional evidence regarding the Claimant's average weekly wage. TR 107. On June 12, 2006, the Claimant's attorney submitted a sworn affidavit of James Langan, Jr. ("Mr. Langan") along with three attachments which were admitted as CX 11. The record was closed on July 31, 2006 after two extensions for both parties to submit closing briefs. However, I reopened the record on October 12, 2006 for the limited purpose of allowing the parties to take and introduce into evidence the deposition testimony of Mr. Langan. On December 5, 2006, Mr. Langan's deposition testimony ("Langan Dep.") was submitted with deposition exhibits marked Langan Exhibits ("LX") 1-6, and the transcript with the deposition exhibits has been entered into the record as CX 12. The parties waived filing supplemental briefs, and the record is now closed.

After consideration of the evidence and the parties' positions, I conclude that the Claimant's injuries and disability are causally related to his employment with the Employer. Accordingly, I will award him temporary total disability compensation from June 30, 2005 until the present and continuing, interest on unpaid compensation, medical care and attorney's fees. My findings of fact and conclusions of law are set forth below.

II. Stipulations and Issues Presented

At hearing, the parties stipulated to the following: (1) The Act applies to the present claim; (2) the injuries occurred on June 30, 2005; (3) the injury occurred at Conley Terminal in

South Boston; (4) there was an Employer/Employee relationship at the time of the injuries; (5) the Employer was timely notified of the injuries; (6) the claim for benefits was timely filed; (7) the Notice of Controversion was timely filed; and (8) the Informal Conference was conducted on November 22, 2005. JX 1. The issues remaining to be adjudicated are: (1) causation, including a defense of employee misconduct; (2) the nature and extent of disability; (3) the average weekly wage; and (4) the Employer's liability for medical bills. *Id.*

III. Findings of Fact

A. Work History and Previous Injuries

The Claimant was 42 years old at the time of the hearing. TR 21. He has an eighth grade education and obtained his GED in 1980 or 1981. *Id*. The Claimant started out working in construction, which entailed installing sewers, doing pavement work, drilling, and blasting. TR 23. In 1982, he began working as a roofer. TR 22. In the off-season, Claimant also did office installation work. TR 23.

In 1995, the Claimant got "banged on the head by an elevator door" causing some hearing loss. TR 62. Due to the accident, the Claimant missed almost a year of work. TR 62. Five years later, around 2000, the Claimant was diagnosed as bi-polar by Dr. Seaeg, a psychiatrist. TR 76. It was at this time that the Claimant was prescribed Prozac and Xanax, both of which he currently still takes. TR 75-77. He sought psychiatric counseling, but stopped around October, 2005. TR 77.

In 2003, the Claimant's appendix ruptured while he was working, and he accidentally fell off a fourth-story roof. TR 70. He suffered a compression fracture in his lower back and was placed in a body cast for a "good number" of months. TR 63, 70. The Claimant attended physical therapy at New England Rehabilitation and also started seeing Dr. Walter H. Jacobs, M.D., ("Dr. Jacobs") as his primary care physician. TR 71, 51. Dr. Jacobs prescribed different medications for the Claimant to determine what would work to relieve his pain over a six month period. TR 71. Numerous drugs, including Percocet which made the Claimant sick, did not work. Finally, at the end of 2003 or the beginning of 2004, the Claimant was first prescribed OxyContin which helped relieve his pain. TR 72. No workman's compensation claim was filed over the 2003 accident. TR 100.

After the fall from the roof, the Claimant decided to pursue a new career. TR 100. In late 2003 or early 2004, he began going to the waterfront seeking work through a hiring hall operated by the International Longshoreman's Association ("ILA"). TR 27-28. For about a year, the Claimant would arrive at five o'clock in the morning to wait in line at the hiring hall to see if there was any work for non-union workers. TR 28-29. The work would be distributed first to the union workers according to seniority; then, if there were any available jobs left, the non-union workers would be distributed jobs through a lottery system. TR 28. In late 2004, Claimant was accepted into the union and given a union card. TR 29. He started working on Gang 12, the lowest of the work gangs in the union. TR 30. The union hiring hall assigns work to the members of Gangs 1-9 each day, and then assigns work to the members of Gangs 10, 11, and 12 based on seniority and demand. CX 12 at 21. If a union member wants to work they

must be at the hiring hall. Langan Dep 24. The members of Gang 12 typically have another job because there is often very limited work available to them. Langan Dep. 21-22. Instead of a second job, the Claimant would work on improvements to his 224-year-old house if there was no work. TR 85.

In February 2005, the Claimant was involved in a car accident in which he hit his head on the dashboard. TR 72-73. His neck was sore, but a CAT scan revealed no injury. TR 72. Dr. Jacobs saw the Claimant in April, May and June of 2005. TR 68. The Claimant informed Dr. Jacobs his pain was a 10 on a scale of 10 and Dr. Jacobs increased the Claimant's OxyContin dosage. TR 68, 72. The Claimant missed no work due to the accident. TR 66. Although he lived with pain every day, he said that "as long as I stuck to a good exercise program and took my medication, I was fine." TR 67.

In March 2005, the Claimant applied and was accepted into Gang 11. CX 12 at 22. In Gang 11, workers start with zero seniority and build it with time. *Id.* at 14. The assignment to Gang 11 gave the Claimant an opportunity to work longer ships and a pay increase.[2] TR 32. The claimant worked four different types of jobs on the docks: a "down job" (unlatching restraints holding containers in place on the ship); an "up job" (taking pins off or putting pins in the containers so they can be loaded on the trucks); a car ship driver (driving foreign cars off of the ships); and driver of a truck called a "bomb cart" (distributing containers from the ship throughout the yard). TR 33-34, 39. The bomb cart is essentially a tractor trailer with an automatic transmission. TR 39.

B. The Injury and Medical Evidence

At eight in the morning on June 30, 2005, the Claimant had just begun a shift working as a truck driver for the Employer. TR 44. After getting his assignment, he walked over to the trucks that were lined up for the day's work. TR 44. He checked his hydraulic lines, started his engine, and got the truck set for the day. TR 45. The Claimant then bent over to place his lunch cooler behind the seat. TR 45. At this moment, another truck, traveling at a "good rate of speed" came in contact with his truck. TR 45, 47. The other truck first hit the driver's side door on the Claimant's truck, causing the Claimant to turn to see what happened. TR 45. The mirror of the second truck then hit the Claimant in the head, and the wheels ran over his toes as he was pinned between the two trucks. TR 47. The moving truck was pulling a trailer which caught the Claimant's body and dragged him forward along the side of his truck until he fell free in front of his own truck. TR 47, 48. The driver of the second truck did not stop. TR 46. The Claimant testified that he started coughing up blood, and his coworkers helped him walk to the office trailer where an ambulance was called. TR 48, 49. The Claimant was placed on a stretcher and taken to the Tufts New England Medical Center emergency department. TR 50. He arrived at the emergency room at 9:29 AM appearing distressed and uncomfortable, reporting pain in his back, and both arms. CX 3 at 20. The Claimant described his pain as 8 out of 10 on a pain scale. CX 3 at 21. No obvious injuries were seen, and the claimant's skin was described as pink, warm,

[2] There was some question at the hearing as to whether the Claimant meant "ships" or "shifts," and when questioned the Claimant responded that he meant "ships." TR 32

and dry with no lacerations or bruises.[3] CX 3 at 23. At 11:00 AM, x-rays were taken. CX 3 at 20. A cervical spine x-ray revealed only a possible slight cervical spasm. CX 3 at 31. No other abnormalities were seen. CX 3 at 31. In the chest x-ray, the lung fields appeared clear and the cardiac silhouette was normal. CX 3 at 32. A lumbar spine x-ray revealed an old compression fracture at the bottom of the spine with a slight loss of height. CX 3 at 33. No other abnormalities were seen. CX at 33. Claimant was released at 11:34 AM with a prescription for Percocet to be taken every 4-6 hours as needed for the pain. CX 3 at 24.

On July 1, 2005, the Claimant was examined by Dr. Jacobs. CX 7 at 57. Dr. Jacobs reported that nine of the Claimant's toenails had fallen off as a result of the accident and that there was significant bruising of the right upper arm, left shoulder, abdomen. CX 7 at 57. The Claimant described his pain as a 10 out of 10, with a throbbing going down his left leg. CX 7 at 57. He was unable to drive due to the pain in the shoulder and neck coupled with the leg and back pain. CX 7 at 57-58. Dr. Jacobs increased the Claimant's dosage of OxyContin, and started seeing him on a weekly basis, which continued through March 27, 2006 when the visits were reduced to every two weeks. TR 73 and CX 7 at 59(a).

Two weeks after the June 30, 2005 accident, the Claimant tested positive for marijuana. TR 83. He denied smoking this substance during the week of the accident, but he admitted to an instance of recreational use at a party celebrating the birth of his granddaughter. TR 83, 84. The Claimant also admitted to a past use of drugs, but he denied any current usage, noting that Dr. Jacobs tests him regularly. TR 83, 84.

On July 18, 2005, the Claimant was examined by Dr. Janet Limke, M.D. ("Dr. Limke") at the Spine Center in New England Baptist Hospital. CX 4 at 34-35. The Claimant did not bring a recent MRI study but did provide Dr. Limke with the cervical and lumbar spine x-rays that were taken after the June 30, 2005 accident. CX 4 at 34. The old compression fracture at L1 was the only deformity noted. CX 4 at 34. Dr. Limke reported that the Claimant complained of numbness and paresthesias in all extremities as well as pain in his head, neck, back, pelvis, arms, and legs. CX 4 at 34-34(a). The Claimant's upper and lower extremity muscle strength was approximately 4/5 throughout his body, with no one muscle group affected greater than another. CX 4 at 34(a). He also demonstrated a significant decrease in range of motion and guarding with the range of motion. CX 4 at 34(a). The Claimant scored 37/45 on his Oswestry scale, and told Dr. Limke that he was virtually unable to do any of his daily activities and unable to work. CX 4 at 34. Dr. Limke created a plan to help the Claimant recover. CX 4 at 34(a). The first step was recommending that the Claimant, with the supervision of Dr. Jacobs, wean himself off the OxyContin. CX 4 at 34(a). The Claimant was taking 240 mg of OxyContin a day at the time. CX 4 at 34. Dr. Limke noted that fatigue and peripheral muscle sensitivity are side effects of narcotics. CX 4 at 34(a). After the "narcotic wean" was in progress, Dr. Limke wanted to start the Claimant on a nonpain modulated, goal-oriented rehab program to increase the Claimant's range of motion, flexibility, overall strength, and conditioning. CX 4 at 34(a). The third step was to help the Claimant work through some pain in order to get back to work and improve his overall function. CX 4 at 34(a). The Claimant was to follow up in four to six weeks with the

[3] Although the Claimant describes having cut his back and shoulders, as well as suffering from swelling and redness in his shoulders, arms, hands, and abdomen, the medical reports from the doctors at Tufts New England Medical Center are credited. TR 48, 49.

hope that he would have been weaned off his OxyContin and in "full swing" of his rehabilitation program. CX 4 at 34(a). Dr. Limke stated that she expected that his overall functioning would be significantly improved at that time. CX 4 at 34(a).

The Claimant went to physical therapy only once at New England Baptist Hospital because he was unable to do the routine. TR 78. The Claimant has secondary insurance coverage through his wife's insurance company Blue Cross/Blue Shield. TR 74. It is unclear which insurance company, the Insurer or Blue Cross/Blue Shield paid for the Claimant's physical therapy session at New England Baptist Hospital. TR 100. However, since neither company covered the physical therapy when the Claimant attempted to switch to a therapist closer to his home, he was not able to continue with the physical therapy program that Dr. Limke had recommended. TR 78. The Employer and the Insurer have declined to pay for any other medical treatments, including the ambulance trip on June 30, 2005. TR 101.

At an office visit on his August 5, 2006 with Dr. Jacobs, the Claimant described persisting left leg and arm numbness and said that he felt unable to work. CX 7 at 58. Dr. Jacobs examined the MRI scans and found central disc protrusions at C5-6 with minimal indentation of the spinal cord and suspected a small lateral protrusion on the left at C4-5 and on the right at C6-7 with blunting of the nerve roots and mild bilateral foraminal compromises at C5-6 and C6-7. CX 7 at 58. Dr. Jacobs stated that he believed these abnormalities were producing neck pain and arm radiation down to the fingers. CX 7 at 59(b). The lumbar MRI showed the old injury at L1 with additional bulges at L4-5 and L5-S1. CX 7 at 58. Additionally, Dr. Jacobs stated his belief that the injury on June 30, 2005 may have resulted in disc damage at L4-5 and L5-S1 which would require lumbosacral spine disc surgery if there was any worsening of the condition. CX 7 at 59(b).

On August 21, 2005, the Claimant went to the emergency room at Lowell General Hospital, reporting "unbearable" pain, "10 out of 10." CX 5 at 44. The Claimant also complained that he had a burning in his lower back and numbness in his arms and legs. CX 5 at 44. He was released with information about pain management and a prescription for OxyCodone. CX 5 at 46.

Dr. Jacobs attempted to lessen the herniated disc symptoms by prescribing Medrol, a steroid, during the August 24, 2005 visit. CX 7 at 58. One week later, the Claimant had stiffness in the neck and no real improvement. CX 7 at 59(a). During his September 13, 2005 visit with Dr. Jacobs, the Claimant reported an improvement in his pain to approximately 8 out of 10. CX 7 at 58. Additionally, the Claimant's toenails started to grow back. CX 7 at 58. The Claimant continued to list his pain as 8 out of 10 throughout September. CX 7 at 58. However, since October 2005, the Claimant has consistently characterized his pain as 10 out of 10 or worse. CX 7 at 59(a). Dr. Jacobs believes that the Claimant can return to work, but will need chronic pain management and a course in physical therapy. CX 7 at 59(b).

On April 3, 2006, the Claimant was examined by Dr. Richard Warnock, M.D. ("Dr. Warnock"). CX 10 at 66. He diagnosed the Claimant as suffering from degenerative cervical disc disease, an old compression fracture at L1, a cervical strain, and a lumbosacral strain. CX 10 at 68. Dr. Warnock stated with a reasonable degree of medical certainty that the cervical and

lumbar strains were causally related to the accident on June 30, 2005, but that the compression fracture and the degenerative disc disease were not substantially aggravated by the accident. CX 10 at 68. He also believed that the Claimant was capable of working in a light duty position with no lifting greater than 25 pounds and possibly more after the Claimant completed 8-10 weeks of physical therapy. CX 10 at 68.

The Claimant has not worked anywhere since the June 30, 2005 accident.[4] TR 98. He testified that he has trouble sitting for any period of time and that he does not feel that he could work until the problems with his neck and arms are fixed. TR 97. In addition to the pain, he said that he is unable to sleep and believes that he should not be placed in a position to be responsible for someone else's money or business in his current condition. TR 97. As of the hearing, Dr. Jacobs had placed the Claimant on a trial of Serequil to help with his sleep troubles. TR 77.

C. Average Wage Evidence

Mr. Langan has been a member of the ILA for 39 years. CX 11 at 1. Mr. Langan has worked as a timekeeper, the payroll master, and in 2002 became the Business Agent for ILA Local 799 in Charlestown, Massachusetts. *Id.* He has previously testified in LHWCA proceedings regarding the earnings of longshoremen in the same or the most similar class. *Id.* at 1-2. It is Mr. Langan's opinion that the Claimant's earnings in the 52 weeks preceding the June 30, 2005 accident do not reasonably reflect his earning capacity because the Claimant's opportunities for work would have been far greater if he had not been injured. CX 11 at 2. In this regard, Mr. Langan testified that work for the Port of Boston increased by 15-20 percent in July 2005. CX 12 at 15, 27. In addition, he pointed out that the Claimant graduated to Gang 11 in March 2005 which provided him with a greater opportunity for work than he had when assigned to Gang 12. *Id.* at 22. While Mr. Langan was not personally familiar with the Claimant's ability and willingness to work, he said that he was able to show the earnings of three other workers with the same seniority and gang status during the 15 months following the Claimant's June 30, 2005 accident. *Id.* at 6, 26. Mr. Langan compiled this earnings data from an "hour book" maintained by the Boston Shipping Association. *Id.* at 12. He also got information from the treasurer of the Local 799 and the business agent of the Local 800. *Id.* at 8. The three comparable workers identified by Mr. Langan were C. M., K. D. and S.W., all of whom graduated into Gang 11 after the Claimant and had the same level of seniority. *Id.* at 6, 9. From October 1, 2004 until July 1, 2005, C. M. worked 158 hours; K. D. worked 32 hours; and S. W. worked 387 hours. *Id.* at LX 3. During the same time period, the Claimant worked 196.5 hours and made a "little over $5,000". *Id.*; TR 84-85. In the period after the accident from July 1, 2005 until September 30, 2006, C. M. worked 2,188 hours; K. D. worked 1,820 hours; and S. W. worked 2,207 hours. LX 3. In the first year after the accident, C. M. earned $35,520.00; K. D. earned $33,009.73; and S. W. earned $45,644.95. CX 11 at 2. The average of their annual earnings is $38,058.49. *Id.* at 3. All three of these workers also earned two weeks vacation and holiday pay in the amount of $5,825.00 each which the Claimant would be eligible for, bringing the average earnings figure to $43,883.49. *Id.* at 3. Mr. Langan testified that it is his opinion

[4] Although the Claimant's pay records (CX 2 at 17 and LX 4 at 4) show earnings posted after June 30, 2005, there is no explanation in the record as to whether these reported earnings represent wages for work performed after June 30, 2005 or some other form of compensation not based on work performed after June 30, 2005. Accordingly, the records do not contradict the Claimant's testimony is credited as truthful.

that the Claimant would have had the same job and earning opportunities as these three workers. CX 12 at 15.

IV. Conclusions of Law

A. Causation

An individual seeking benefits under the Act must establish that he suffered an "accidental injury…arising out of and in the course of employment." 33 U.S.C. § 902(2). In determining whether an injury arose out of and in the course of employment, the Claimant is assisted by Section 20(a) of the Act, which creates a presumption that a claim comes within its provisions. 33 U.S.C. § 920(a). To make out a *prima facie* which invokes the presumption that he suffered a work-related injury, the Claimant "must at least allege an injury that arose in the course of employment as well as out of employment" and show that he "sustained physical harm and that conditions existed at work which could have caused the harm." *Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 4 (1st Cir. 1999) (*Brown*), quoting *U.S. Indus./Fed. Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 615 (1982). "[T]he claimant is not required to show a causal connection between the harm and his working conditions, but rather must show only that the harm could have been caused by his working conditions." *Bath Iron Works Corporation v. Preston*, 380 F.3d 597, 605 (1st Cir. 2004) (*Preston*) (underlining added). The Claimant also is not required to prove that the employment-related exposures were the predominant or sole cause of the injury.

In the present case, the Claimant has alleged his injuries are a result of an accident at work on June 30, 2005. To show this, the Claimant offered as exhibits the medical opinions from Dr. Jacobs and Dr. Warnock. It is Dr. Jacob's opinion that the Claimant sustained significant injuries as a result of the accident at work on June 30, 2005. CX 7 at 59(b). Dr. Jacobs believes that as a result of the accident, the Claimant suffers from a probable cervical spine injury at the C4-5, C5-6 and C6-7 levels with minimal indentation of the spinal cord at C5-6 and blunting of the nerve roots at C4-5 and C6-7 resulting in neck pain and arm radiation down to the fingers. CX 7 at 59(b). It is also Dr. Jacobs' opinion that the Claimant suffered disc damage at L4-5 and L5-S1 as a result of the accident which may require surgery if the condition worsens. CX 7 at 59(b).

Dr. Warnock states that it is his medical opinion within a reasonable degree of medical certainty that the Claimant's cervical and lumbar strains are causally related to the June 30, 2005 accident at work. CX 10 at 68. Dr. Warnock also states that the Claimant suffers from degenerative cervical disc disease and an old compression fracture at L1 which are not related to the accident and do not appear to have been substantially aggravated by the accident. CX 10 at 68.

Based on this evidence, I find that the Claimant has satisfied his *prima facie* burden of establishing that he sustained physical harm and that conditions existed at his place of employment which could have caused or aggravated the harm. *See Kelaita v. Triple A. Machine Shop*, 13 BRBS 326, 331 (1981). Although it is clear that the Claimant had a serious back injury before he went to work as a longshoreman, a work-related aggravation of a pre-existing

condition qualifies as an injury under the LHWCA. *Preston*, 380 F.3d at 605, citing *Gardner v. Director, OWCP*, 640 F.2d 1385, 1389 (1st Cir.1981). *See also Rajotte v. General Dynamics Corp.,* 18 BRBS 85, 86 (1986) (if an injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resulting disability is compensable). Therefore, the statutory presumption of compensability is invoked. *Preston*, 380 F.3d at 605; *Brown*, 194 F.3d at 5.

Since the Claimant has established a *prima facie* case, he has invoked the presumption, and the burden shifts to the Employer to "rebut the presumption with substantial evidence that the condition was not caused or aggravated by his employment." *Bath Iron Works Corp. v. Director, OWCP*, 109 F.3d 53, 56 (1st Cir. 1997). Evidence is "substantial" if it is the kind that a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Sprague v. Director, OWCP*, 688 F.2d 862, 865 (1st Cir. 1982). Under the substantial evidence standard, an employer does not have to exclude any possibility of a causal connection to employment, for this would be an impossible burden; it is enough that it produce medical evidence of "reasonable probabilities" of non-causation. *Bath Iron Works Corp. v. Director, OWCP,* 137 F.3d 673, 675 (1st Cir. 1998). *See also Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 289 (5th Cir. 2003) (rejecting requirement that an employer "rule out" causation or submit "unequivocal" or "specific and comprehensive" evidence to rebut the presumption and reaffirming that "the evidentiary standard for rebutting the § 20(a) presumption is the minimal requirement that an employer submit only 'substantial evidence to contrary.'"), *cert. denied*, 540 U.S. 1056 (2003). If the presumption is rebutted, it no longer controls, and the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280, 286-287 (1935).

I find that Dr. Warnock's opinion does not rebut the Section 20(a) presumption that the Claimant's injury is related to his employment. In fact, Dr. Warnock stated that it is his opinion within a reasonable degree of medical certainty that the Claimant's injuries were related to employment at work. CX 10 at 68. Dr. Warnock goes even farther to put restrictions on the Claimant's ability to work and to recommend that the Claimant receive physical therapy for his injuries. CX 10 at 68. Thus, I conclude that the Employer has failed to rebut the Section 20(a) presumption, and the Claimant is presumed to have a work-related injury.

Nevertheless, the Employer can avoid paying compensation for the injury if it can successfully rebut the Section 20(c) presumption that the injury was not occasioned solely by the intoxication of the injured employee. 33 U.S.C. § 920(c).[5] In order to rebut this presumption, the employer must provide substantial evidence to the contrary. 33 U.S.C. § 920(c). Proof of an employee's intoxication alone is insufficient to rebut the Section 20(c) presumption. *Sheridon v. Petro-Drive, Inc*, 18 BRBS 57, 60 (1986). The employer is required to proffer evidence that the claimant was injured due to his intoxication and rule out all other causes for the accident. *Id.* When an employer does not offer any evidence of the circumstances surrounding the accident, the employer fails to show intoxication of the claimant as the sole cause. *Lawson v. North American Shipyard*, BRB No. 98-1057 at 4 (April 27, 1999) (unpublished). Here, the Employer

[5] Section 3(c) of the Act provides that an employer will not have to pay any compensation where the employee's injury is solely occasioned by the employee being intoxicated. 33 U.S.C. § 903(c).

offered evidence that the Claimant failed a drug test two weeks after the accident and that the Claimant takes OxyContin on a daily basis. TR 83, 73. This evidence, however, does not establish that the Claimant was intoxicated on the day of the accident. Additionally, the Employer has failed to establish that the accident and subsequent injuries were caused by the Claimant's intoxication. The accident involved a truck hitting the Claimant, while he was preparing his own truck for the work day. TR 45. It is unclear how any intoxication of the Claimant could be the sole cause of the accident, especially when there is no evidence that the accident was Claimant's fault. Indeed, on the uncontested facts in this record, it seems likely that a stone sober worker would have been just as harmed in the accident as an intoxicated one. Accordingly, I conclude that the Employer has failed to meet its burden because it has only offered evidence of the Claimant's possible intoxication and has offered no evidence of the circumstances surrounding the accident. *Sheridon*, 18 BRBS at 60.

B. Nature and Extent of Disability

The LHWCA defines disability as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment . . . ." 33 U.S.C. § 902(10). Disability determinations involve "two independent areas of analysis -- nature (or duration) of disability and degree of disability." *Stevens v. Director, OWCP*, 909 F.2d 1256, 1259 (9th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991). The burden of proving the nature and extent of disability rests with the Claimant. *Trask v. Lockheed Shipbuilding Constr. Co.*, 17 BRBS 56, 59 (1980) (*Trask*). Specifically, to receive an award of disability compensation, the Claimant must prove an economic loss coupled with a physical and/or psychological impairment. *Sproull v. Stevedoring Serv. of Am.*, 25 BRBS 100, 110 (1991). Thus, proof of compensable disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

1. Nature of Disability

There are two tests for determining whether a disability is permanent. Under the first test, a claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. *Trask,* 17 BRBS at 60. The question of when maximum medical improvement is reached is primarily a question of fact based upon medical evidence. *Ballesteros v. Willamette W. Corp.*, 20 BRBS 184, 186 (1988). An administrative law judge may rely on a physician's opinion in establishing the date of maximum medical improvement. *Miranda v. Excavation Constr., Inc.,* 13 BRBS 882, 884 (1981). Under the second test, a disability may be considered permanent if the impairment has continued for a lengthy period and appears to be of lasting or indefinite duration. *Air Am., Inc. v. Dir., OWCP,* 597 F.2d 773, 781-782 (1st Cir. 1979).

In this matter, the Claimant concedes that he has not reached maximum medical improvement. Both Dr. Jacobs and Dr. Warnock recommend a course in physical therapy and believe that once treated the Claimant should be able to return to work. CX 7 at 59, CX 10 at 68. Additionally, while the Claimant's disability has continued for a lengthy period of time, it does not appear to be of lasting or indefinite duration as both Dr. Jacobs and Dr. Warnock expect

recovery. CX 7 at 59, CX 10 at 68. Accordingly, I find that the Claimant's disability is temporary.

2. Extent of Disability

A three-part test is employed to determine whether a claimant is entitled to an award of total disability compensation: (1) a claimant must first establish a *prima facie* case of total disability by showing that he cannot perform his former job because of job-related injury; (2) upon this *prima facie* showing, the burden then shifts to the employer to establish that suitable alternative employment is readily available in the employee's community for individuals of the same age, experience and education as the employee which requires proof that "there exists a reasonable likelihood, given the claimant's age, education, and background, that he would be hired if he diligently sought the job"; and (3) the claimant can rebut the employer's showing of suitable alternative employment with evidence establishing a diligent, yet unsuccessful, attempt to obtain that type of employment. *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 434 (1st Cir. 1991) (*Legrow*).

When establishing a *prima facie* case for total disability, the Claimant need not establish that he cannot return to any employment; only that he cannot return to his former employment. *Elliot v. C & P Tel. Co.*, 16 BRBS 89, 91 (1984). The same standard applies regardless of whether the claim is for temporary total or permanent total disability. If the claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co. (Walker II)*, 19 BRBS 171, 172 (1986). A physician's opinion that the employee's return to his usual or similar work would aggravate his condition is sufficient to support a finding of total disability. *Care v. Washington Metro. Area Transit Auth.,* 21 BRBS 248, 251 (1988).

In the present case, the Claimant has shown that he cannot return to his former employment based on the opinions of Dr. Jacobs and Dr. Warnock. Dr. Jacobs does not believe that the Claimant can return to work until he undergoes physical therapy. CX 7 at 59. Dr. Warnock believes that the Claimant is capable only of a light duty position with no lifting greater than 25 pounds until he undergoes eight to ten weeks of physical therapy. CX 10 at 68. I find that the Claimant has established his *prima facie* case for total disability and will be presumed totally disabled unless the Employer can rebut the presumption.[6] *Walker v. Sun Shipbuilding & Dry Dock Co. (Walker II)*, 19 BRBS 171, 172 (1986). The burden therefore is on the Employer to establish that suitable alternative employment is readily available. *Legrow*, 935 F.2d at 434. The Employer has not offered any evidence of a suitable alternative employment, nor has the Employer offered to allow the Claimant to come back to work under the restrictions set forth by

[6] As discussed above, the medical records show that the Claimant reported 10/10 pain levels before the June 30, 2005 accident. While not raised by the Employer, one could view this evidence, standing alone, as suggesting that the June 30, 2005 accident did not disable the Claimant. In other words, if the Claimant was already at the maximum pain level before he was run over by the truck at work, can one really say that the accident worsened his condition and caused him to be disabled? However, it is well-known that pain is a subjective matter, and the uncontradicted opinions from Drs. Jacobs and Dr. Warnock clearly establish that the Claimant suffered physical injuries during the June 30, 2005 accident and cannot return to his work on the waterfront because of these injuries. This is enough to establish disability under the aggravation doctrine even if the Claimant's pre-existing conditions played significant contributory roles. *Bath Iron Works Corporation v. Preston*, 380 F.3d 597, 605 (1st Cir. 2004); *Gardner v. Director, OWCP*, 640 F.2d 1385, 1389 (1st Cir.1981).

Dr. Warnock. I find that the Employer has not met its burden, and the Claimant is totally disabled. Therefore the Claimant has succeeded in proving temporary total disability and should be compensated accordingly.

C. The Average Weekly Wage

Section 10 sets forth three alternative methods for determining a claimant's average annual earnings. The computation methods are directed towards establishing a claimant's earning power at the time of the injury. *Johnson v. Newport News Shipbuilding & Dry Dock Co.,* 25 BRBS 340, 343-344 (1992). A determination of an employee's annual earnings must be based on substantial evidence. *Sproull v. Stevedoring Servs. Of America,* 25 BRBS 100, 104 (1991). The party contending actual wages are not representative bears the burden of producing supporting evidence. *Riddle v. Smith & Kelly Co.,* 13 BRBS 416, 418 (1981). The claimant's testimony may be considered substantial evidence. *Carle v. Georgetown Builders*, 14 BRBS 45, 51 (1980). However, the ALJ judge can reject the claimant's testimony due to his lack of credibility. *Mattera v. M/V Mary Antoinette, Pac. King, Inc.,* 20 BRBS 43, 45 (1987).

Section 10(a) applies if the employee "worked in the employment … whether for the same or another employer, during substantially the whole of the year immediately preceding" the injury. 33 U.S.C. § 910(a). Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but "did not work for substantially the whole year" prior to his injury. 33 U.S.C. § 910(b). However, both Section 10(a) and Section 10(b), are only applicable where the injured employee worked full time in the employment in which he was injured. *Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d 1336, 1342 (9th Cir. 1982), *vacated in part on other grounds*, 462 U.S. 1101 (1983), *decision on remand*, 713 F.2d 462 (1983). Sections 10(a) and 10(b) presuppose that work would be available to the claimant each day. *Gilliam v. Addison Crane Co.,* 21 BRBS 91, 92 (1987) (Section 10(c) was properly applied where varying daily needs and weather conditions had caused work to be available to claimant only on an intermittent basis).

In the present case, the Claimant's work for the year prior to the injury was not full-time. In early 2004, the Claimant would arrive at the hiring hall and received work if there were any jobs left over after the union members received their assignments. TR 28-29. In late 2004, the Claimant received his union card and was placed in Gang 12. TR 29-30. Typically, members of Gang 12 have another job because the work available to them is very limited. CX 12 at 21-22. The Claimant graduated into Gang 11 in March 2005, increasing his opportunity to work longer ships and more hours. CX 12 at 22; TR 12. However, Gang 11 members start with zero seniority and only build seniority with time, so the amount of work they receive is dependant on the daily need as well. CX 12 at 14. Therefore, since the Claimant did not work full-time for the year preceding the accident, Section 10(c) is applicable and not Sections 10(a) and 10(b).

Section 10(c) is a general, catch-all provision applicable to cases where the methods of subsections (a) and (b) cannot be realistically be applied. *Gilliam v. Addison Crane Co.,* 21 BRBS 91, 92-93 (1987). The relevant factors are (1) the previous earnings of the injured employee in the employment in which he was working at the time of the injury, (2) the previous earnings of similar employees in the same class and (3) other employment of the injured worker,

including self-employment. 33 U.S.C. § 910(c). It should be applied when actual earnings during the year preceding the injury do not reasonably and fairly represent the pre-injury wage-earning capacity of the claimant. *Gilliam v. Addison Crane Co.,* 21 BRBS 91, 92-93 (1987). The judge has broad discretion in determining annual earning capacity under Section 10(c). *Sproull v. Stevedoring Servs. of America,* 25 BRBS 100, 105 (1991). A definition of "earning capacity" for purposes of this subsection is the "ability, willingness, and opportunity to work," or "the amount of earnings the claimant would have the potential and opportunity to earn absent injury." *Jackson v. Potomac Temporaries, Inc.* 12 BRBS 410, 413 (1980). Consideration of the probable future earnings of the claimant is appropriate in extraordinary circumstances, where previous earnings do not realistically reflect wage-earning potential. *Walker v. Washington Metro Area Transit Auth*., 793 F.2d 319, 322 (D.C. Cir. 1986), *cert denied*, 479 U.S. 1094 (1987). Actual earnings in the year preceding the claimant's injury may not be a fair and reasonable representation of the claimant's wage-earning capacity where the claimant's wages were reduced for reasons the unavailability of work. *Lozupone v. Stephano Lozupone & Sons*, 14 BRBS 462, 464 (1981). A judge may make up for the loss of earnings only when it is clear that the work would be available in the future. *Lozupone v. Stephano Lozupone & Sons*, 14 BRBS 462, 464 (1981). Likewise, actual earnings may not be fair and reasonable where a claimant received a promotion shortly before his injury. *Feagin v. General Dynamics Corporation., Elec. Boat Div.,* 10 BRBS 664, 666 (1979). The ALJ must arrive at a figure which approximates an entire year of work (the average annual earnings). That figure is then divided by 52, as required by Section 10(d), to arrive at the average weekly wage. *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991).

In the instant case, the Claimant only made a little over $5,000 in the year prior to his injury. TR 84-85. These previous wages are not representative of what the Claimant would have earned after his injury for two reasons. First, the Claimant was promoted into Gang 11 only a few months before the accident. TR 12. While the Claimant's wages were contingent upon the availability of work both while in Gang 12 and in Gang 11, the Claimant's promotion into Gang 11 gave him more opportunities to work and increased hours. TR 12. Second, the Claimant was injured right before there was a 15-20% increase in the demand for work at the Port of Boston. CX 12 at 15, 27. Therefore, I conclude that the year preceding the injury is not representative of the Claimant's pre-injury wage-earning ability because he had substantially increased his opportunities to be assigned work on a daily basis. *See Lozupone v. Stephano Lozupone & Sons*, 14 BRBS 462, 464 (1981). Further, the Claimant's annual earnings would have increased greatly as the workload for the Port of Boston increased by 15-20 percent, starting the month after he was injured, so that his pre-injury earnings are not reflective of his true future wage-earning capacity at the time of the injury. *Id.* As the Claimant's previous earnings are not representative of his pre-injury wage-earning capacity, I must look elsewhere to determine the Claimant's probable future earnings. *Walker v. Washington Metro Area Transit Auth*., 793 F.2d 319, 322 (D.C. Cir. 1986), *cert denied*, 479 U.S. 1094 (1987).

As evidence of what his probable future earnings would have been, the Claimant introduced the testimony from Mr. Langan to show what similar employees earned in the period subsequent to the accident. *See Riddle v. Smith & Kelly Co.,* 13 BRBS 416, 418 (1981). It is Mr. Langan's opinion that the Claimant's wage-earning potential is demonstrated by the post-injury earnings of three workers with the same seniority who graduated to Gang 11 after the

Claimant. CX 12 at 6. The three identified coworkers also appear to have demonstrated the same or lower ability or willingness to work as the Claimant. In the nine months before the accident the Claimant worked a total of 196.5 hours. *Id.* at LX 3. In this same time, C. M. worked 158 hours; K. D. worked 32 hours, and S. W. worked 387 hours. *Id.* All three workers saw a dramatic increase in their opportunity for work in the 15 months after the accident. C. M. worked 2,188 hours, K. D. worked 1,820 hours and S. W. worked 2,207 hours. *Id.* The average annual wages for the three longshoreman was $38,058.49, but that does not include $5,825 in vacation and holiday pay that the Claimant would have received. CX 11 at 3. Mr. Langan thus testified that the Claimant's probable earnings would have been $43, 883.49. *Id.*

The Employer argues in its brief basing the Claimant's compensation on the post-injury earnings of the comparable workers would result in a "windfall" to the Claimant, increasing his earnings by nine times of that of the previous year in which he earned only $5,000. E'er Brief at 5, 8. It also argues that the Claimant's ability and willingness to work was diminished by the pre-injury pain, drug use, and overall attitude. *Id.* at 7. The Employer contends that in addition to union structure, these factors all played a role in limiting the Claimant's earnings to $5,000 in the year preceding the accident. *Id.* at 6-7. However, I conclude that the three longshoremen identified by Mr. Langan are representative of the Claimant's ability and willingness to work as the record shows that the Claimant worked more hours than two of the three in the nine months preceding the injury while in pain and taking OxyContin. Additionally, it is undisputed that all three workers experienced a substantial increase in annual earnings in the year immediately following the June 30, 2005 accident. Thus, I find that a determination of the Claimant's average weekly wage that takes the post-injury wages of comparable workers into consideration produces a realistic assessment of his wage-earning capacity and no more of a windfall than the dramatic increase in wages that his fellow Gang 11 longshoremen, who were fortunate enough to avoid disabling injury, experienced after June of 2005.

Based on the foregoing analysis, I find that the Claimant's wage-earning capacity at the time of his injury is fairly and reasonably established by an average of the post-injury earnings, including paid vacation time, of the three comparable workers. This average is $43, 883.49, resulting in an average weekly wage of $843.91.

E. Compensation Due

The Claimant is entitled to an award of temporary total disability compensation pursuant to section 8(b) of the LHWCA at the weekly rate of $562.61 (two-thirds of the stipulated average weekly wage) from June 30, 2005 to the present and continuing. 33 U.S.C. § 908(b). Additionally, the Claimant is entitled to interest on any compensation payments that were not timely made. *See Foundation Constructors v. Director, OWCP*, 950 F.2d 621, 625 (9th Cir.1991) (noting that "a dollar tomorrow is not worth as much as a dollar today" in authorizing interest awards as consistent with the remedial purposes of the Act). *See also Quave v. Progress Marine*, 912 F.2d 798, 801 (5th Cir.1990), *reh'g denied* 921 F. 2d 273 (1990), *cert. denied*, 500 U.S. 916 (1991). The appropriate interest rate shall be determined pursuant to 28 U.S.C. § 1961 (2003) as of the filing date of this Decision and Order with the District Director.

F. Medical Bills

Under Section 7 of the Act, a claimant who suffers a work-related injury is entitled to reasonable and necessary medical treatment. 33 U.S.C. §907(a); *Bath Iron Works Corp. v. Director, OWCP*, 244 F.3d 222, 229 (1st Cir. 2001); *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86, 94 (1989). I have determined that the Claimant's cervical and lumbar injuries are related to his work for the Employer. The Claimant is therefore entitled to medical care for these conditions. Accordingly, I conclude that the Employer shall pay for all medical expenses reasonably and necessarily incurred as a result of the Claimant's work-related cervical and lumbar injuries, and it shall continue to provide for all such care, including the physical therapy recommended by Drs. Jacobs and Warnock, required in the future. *Colburn v. General Dynamics Corp.,* 21 BRBS 219, 222 (1988).

G. Attorney's Fees

Since the Claimant utilized an attorney to successfully establish his right to benefits, he is entitled to an award of attorneys' fees under section 28 of the LHWCA. *See Lebel v. Bath Iron Works*, 544 F.2d 1112, 1113 (1st Cir. 1976); *Kinnes v. General Dynamics Corporation*, 25 BRBS 311, 314 (1992). In my order, I will allow the Claimant's attorney 30 days from the date this Decision and Order is filed with the District Director to file a fully supported and fully itemized fee petition as required by 20 C.F.R. § 702.132, and the Employer and Insurer will be granted 15 days from the filing of the fee petition to file any objection.

V. Order

Based upon the foregoing Findings of Fact and Conclusions of Law, and upon the entire record, the following compensation order is entered:

1. The Employer, Columbia Coastal Transportation, LLC and the Insurer, AIM Mutual Insurance Co., shall pay to the Claimant, K. T. , temporary total disability compensation pursuant to 33 U.S.C. § 908(b) from June 30, 2005 through the present and ongoing at the rate of $562.61 per week, plus interest on all past due compensation, computed from the date each payment was originally due until paid, and the appropriate rate shall be determined pursuant to 28 U.S.C. § 1961 (2003) as of the filing date of this Decision and Order with the District Director;

2. Columbia Coastal Transportation, LLC and AIM Mutual Insurance Co. shall pay for and provide all reasonable and necessary medical care pursuant to 33 U.S.C. § 907 for K. T.'s compensable cervical and lumbar strains;

3. The Claimant's attorney shall have 30 days from the date of this order in which to file an application for attorney's fees, and Columbia Coastal Transportation and AIM Mutual Insurance Co. shall have 15 days from the date of service of the application to file any objection; and

4. All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

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DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts